Sia Pang Liong v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–103 OF 2010(B)
ARIFIN ZAKARIA CHIEF JUSTICE, MOHD GHAZALI AND RAUS SHARIF FCJJ
5 OCTOBER 2011

Criminal Procedure — Appeal — Conviction and sentence, against — Fact, finding of — Appellant charged with drug trafficking — Whether drug exhibits produced at trial were same exhibits seized from appellant — Whether apex court should review concurrent finding of fact from courts below that there was no break in chain of evidence relating to movement of drug exhibits

Evidence — Exhibits — Break in chain of evidence — Appellant challenged identity of drug exhibits — Prosecution's failure to call forensic expert — Whether prosecution should call all persons who handled drug exhibits as witnesses to establish identity of exhibits — Whether failure to call forensic expert raised doubt in prosecution's case

The appellant was at the departure gate of the Kuala Lumpur International Airport (KLIA) to board a flight to Paris, when he was stopped by an officer on duty at the airport. When the officer conducted a body search and found something bulky stuck to the appellant's right calf, he alerted the Narcotics Department of KLIA (the Narcotics Department). The appellant was then subjected to a full body search by two officers from the Narcotics Department. In this search the officers found four packets of a white powdery substance, which a chemist later confirmed to be 2,600.7g of heroin, strapped to each side of the appellant's calves. The appellant was arrested and charged for trafficking in 2,600.7g of heroin, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The appellant's defence was that he had no knowledge that the four packets strapped to his legs contained dangerous drugs. The appellant was convicted and sentenced to death by the High Court. When his conviction and sentence were affirmed by the Court of Appeal he proceeded with the present appeal on the grounds that the drug exhibits produced at the trial were not the same exhibits that were seized from the appellant at the airport. It was the appellant's contention that the prosecution's failure to call the forensic expert, who was in possession of the drug exhibits, had created a doubt as to whether the drug exhibits had been tampered with when they were in the possession of the forensic expert. In response the prosecution submitted that this issue as to the possibility of the drug exhibits being tampered with was never an issue before the High Court or the Court of Appeal. The prosecution

A thus contended that it was too late in the day for the appellant to raise this issue now.

Held, allowing the appeal:

B (1) Both the High Court and the Court of Appeal had made a concurrent finding that there was no break in the chain of evidence relating to the movement of the drug exhibits, and it was not the practice of the apex court to review the concurrent findings of fact from the courts below. It was also trite law that the prosecution need not call all the persons who C handled the drug exhibits as witnesses in order to establish the identity of the exhibits. As such, the prosecution's failure to call the forensic expert in this case would not be fatal to the prosecution's case. However, once the identity of the drug exhibits was challenged by the appellant it became the burden of the prosecution to adduce evidence that the drug exhibits D that were recovered from the appellant in the airport and that were sent to the chemist for analysis were the same drug exhibits that the appellant was charged with (see paras 8–11).

(2) In the present case, the officer on duty at the airport had handed over all E the drug exhibits recovered from the appellant at the airport to the investigating officer of the case ('the IO') on the same day. The drug exhibits were in IO's possession until they were handed over to the forensic expert for the purpose of fingerprint analysis. It was the IO's evidence that when the forensic expert returned the drug exhibits to him, F he had packed the drug exhibits and sent them to the chemist. However, nowhere in his evidence had the IO indicated that the drug exhibits that he had received from the forensic expert were the same drug exhibits that he had sent to the forensic expert for fingerprint analysis. Through the IO it was also revealed that the findings of the forensic expert on the presence of fingerprints on the drug exhibits were negative. The forensic expert, G who could have saved the situation by identifying the drug exhibits, was not called as a witness for the prosecution. In the circumstances of this case, the failure of the prosecution to call the forensic expert as a witness raised a doubt in the prosecution's case as to whether the drug exhibits analysed by the chemist were the same drug exhibits recovered from the H appellant. This benefit of the doubt had to be given to the appellant (see paras 12–16).

(3) Based on the circumstances of this case, the conviction of the appellant was unsafe. Thus, his conviction and sentence ought to be set aside (see I paras 17–18).

[Bahasa Malaysia summary

Perayu sedang berada di pintu masuk pelepasan Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') untuk menaiki penerbangan menuju ke

Paris, apabila dia telah ditahan oleh seorang pegawai bertugas di lapangan terbang. Apabila pegawai tersebut menjalankan carian badan dan mendapati sesuatu yang besar melekat pada betis kanan perayu, dia memaklumkan Ke Jabatan Narkotik KLIA ('Jabatan Narkotik'). Perayu kemudiannya dikenakan carian badan penuh oleh dua orang pegawai dari Jabatan Narkotik. Dalam carian ini, pegawai mendapati empat paket serbuk putih, yang kemudiannya disahkan oleh ahli kimia sebagai 2,600.7g heroin, telah diikat pada setiap sisi betis perayu. Perayu ditangkap dan didakwa kerana mengedar 2,600.7g heroin, suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pembelaan perayu adalah bahawa dia tidak mempunyai pengetahuan bahawa empat paket yang diikat pada kakinya mengandungi dadah berbahaya. Perayu telah disabitkan kesalahan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi. Apabila sabitan dan hukuman disahkan oleh Mahkamah Rayuan, perayu meneruskan dengan rayuan ini atas alasan bahawa ekshibit-ekshibit dadah yang dikemukakan ketika perbicaraan bukan ekshibit-ekshibit dadah yang sama yang dirampas daripada perayu di lapangan terbang. Adalah menjadi hujahan perayu bahawa kegagalan pihak pendakwaan untuk memanggil pakar forensik, yang memiliki ekshibit-ekshibit dadah tersebut, telah mewujudkan keraguan tentang sama ada ekshibit-ekshibit dadah tersebut telah diusik ketika berada dalam milikan pakar forensik. Sebagai jawapan, pihak pendakwaan menghujahkan bahawa isu kemungkinan ekshibit-ekshibit dadah telah diusik tidak pernah menjadi isu di hadapan Mahkamah Tinggi atau Mahkamah Rayuan. Pihak pendakwaan menghujahkan bahawa kini terlambat untuk perayu membangkitkan isu tersebut.

Diputuskan, membenarkan rayuan:

(1) Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan telah membuat dapatan serentak bahawa tidak ada pemutusan dalam rantaian bukti berkaitan dengan pergerakan ekshibit-ekshibit dadah, dan ia bukanlah amalan mahkamah tertinggi untuk menyemak penemuan fakta serentak daripada mahkamah bawahan. Ia juga merupakan undang-undang mantap bahawa pihak pendakwaan tidak perlu memanggil kesemua orang yang mengendalikan ekshibit-ekshibit dadah sebagai saksi dalam usaha untuk membuktikan identiti ekshibit-ekshibit. Oleh itu, kegagalan pihak pendakwaan untuk memanggil pakar forensik dalam kes ini tidak akan menjejaskan kes pendakwaan. Walau bagaimanapun, apabila identiti ekshibit-ekshibit dadah dicabar oleh perayu, ia menjadi beban pihak pendakwaan untuk mengemukakan keterangan bahawa ekshibit-ekshibit dadah yang diperolehi daripada perayu di lapangan terbang dan yang dihantar kepada ahli kimia untuk dianalisa, adalah ekshibit-ekshibit dadah yang sama, yang mana perayu telah dituduh (lihat perenggan 8–11).

(2) Dalam kes ini, pegawai yang bertugas di lapangan terbang telah

menyerahkan kesemua ekshibit-ekshibit dadah yang diperolehi daripada perayu di lapangan terbang pada hari yang sama, kepada pegawai penyiasat kes tersebut ('IO'). Ekshibit-ekshibit dadah berada dalam milikan IO sehingga kesemuanya diserahkan kepada pakar forensik bagi tujuan analisa cap jari. Adalah menjadi keterangan IO bahawa apabila pakar forensik mengembalikan ekshibit-ekshibit dadah kepadanya, dia telah membungkus ekshibit-ekshibit dadah tersebut dan menghantar kesemuanya kepada ahli kimia. Walau bagaimanapun, tiada di mana-mana dalam keterangannya telah IO menunjukkan bahawa ekshibit-ekshibit dadah yang diterima daripada pakar forensik adalah ekshibit-ekshibit dadah yang sama yang telah dihantar kepada pakar forensik untuk analisa cap jari. Melalui IO juga, didedahkan bahawa penemuan pakar forensik mengenai kehadiran cap jari pada ekshibit-ekshibit dadah adalah negatif. Pakar forensik, yang sepatutnya boleh menyelamatkan keadaan dengan mengenal pasti ekshibit-ekshibit dadah, tidak dipanggil sebagai saksi bagi pihak pendakwaan. Dalam keadaan kes ini, kegagalan pihak pendakwaan untuk memanggil pakar forensik sebagai saksi menimbulkan keraguan dalam kes pendakwaan iaitu sama ada ekshibit-ekshibit dadah yang dianalisa oleh ahli kimia adalah ekshibit-ekshibit dadah yang sama yang diperolehi daripada perayu. Manfaat keraguan ini terpaksa diberikan kepada perayu (lihat perenggan 12–16).

(3) Berdasarkan hal keadaan kes ini, sabitan perayu adalah tidak selamat. Oleh itu, sabitan dan hukuman harus diketepikan (lihat perenggan 17–18).]

Notes

For cases on break in chain of evidence, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1625–1642.

For cases on conviction and sentence against, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 324–370.

Cases referred to

PP v Munusamy [1980] 2 MLJ 133, FC (refd)
Su Ah Ping v PP [1980] 1 MLJ 75, FC (refd)
Gunalan a/l Ramachandran & Ors v PP [2006] 2 MLJ 197, FC (refd)
Satli bin Masot v PP [1999] 2 SLR 637, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(1)(a)

Sivananthan (Tina Ong with him) (Sivananthan) for the appellant.
Saiful Edris Zainuddin (Attorney General's Chambers) for the respondent.

Raus Sharif FCJ (delivering judgment of the court):

INTRODUCTION

[1] The appellant was charged for trafficking in 2600.7g of heroin, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). He was convicted and sentenced to death by the High Court. His conviction and sentence was affirmed by the Court of Appeal. He now appeals to this court.

FACTS

[2] The facts of this case are well set out in the judgment of the Court of Appeal and we do not propose to repeat them here except to state briefly the following facts relevant to the issue raised in this appeal:

(a) the appellant was arrested on 27 September 2003 at B2 Departure Gate of the Kuala Lumpur International Airport ('KLIA'). He was on his way to board flight MH20 to Paris;

(b) before his arrest, he was seen by Kunasegaran a/l Kandasamy ('PW4'), walking in a limping manner ('berjalan berjongket-jongket dengan keadaan tidak sempurna') when passing the metal detector. PW4 was then on duty, checking on passengers boarding flight MH20 to Paris;

(c) PW4 conducted a search on the appellant and found something bulky stuck to the appellant's right calf. PW4 immediately contacted the narcotic officers from the Narcotic Department of KLIA;

(d) Detective Sergeant Alias bin Karim ('PW5') and another officer came to Gate B2 and brought the appellant to a room next to Gate B2 for a body search in the presence of PW4, It was found that there were four packets strapped to the appellant's legs. One packet was strapped with a knee guard to each side of the appellant's thigh and one packet was strapped with a transparent plastic to each side of the appellant's calves;

(e) it was found that the four packets contained white powdery substance covered with black powdery substance. The contents of each of the four packets were analysed by the Chemist, Halimah bt Abdul Rahman ('PW2') and they were found to contain a total of 2600.7g of heroin; and

(f) the appellant in his defence did not dispute that the four plastic packets were strapped around his legs and he was on the way to board the flight MH 20 to Paris. However, he denied having knowledge that the four packets contained dangerous drugs. He believed that the four plastic packets contained Chinese medicine.

A SUBMISSIONS

[3] Before this court, En Sivanathan, learned counsel for the appellant, raised only one ground of appeal ie the failure of the prosecution to explain the movement of the drug exhibits for a period of one month which is from 29 September 2003–28 October 2003. This was the period when the drug exhibits were in possession of the forensic expert, ASP Izanizam.

[4] The complaint by the learned counsel is that ASP Izanizam was not called as a witness by the prosecution to explain what he did with the drug exhibits in particular as to how the drug exhibits were kept. He contended that the non-calling of ASP Izanizam had created doubt to the prosecution's case as the prosecution had failed to eliminate the possibility of mixing up of the drug exhibits with other exhibits or that the drug exhibits being tempered with when they were in possession of ASP Izanizam.

[5] The learned deputy public prosecutor, En Saiful Edris bin Hj Zainuddin ('DPP') submitted that the issue raised by learned counsel was never an issue before the High Court as well as the Court of Appeal. According to him, the appellant only defence was that he had no knowledge that the four packets strapped to his legs contained dangerous drugs. Thus, he contended that it is too late in the day for the defence to raise the issue of the possibility of the drug exhibits being mixed up or that it had being tempered with when it was in possession of ASP Izanizam. This is especially so when the learned trial judge and the Court of Appeal had made a concurrent finding … of facts that there was no break in the chain of evidence relating to the movement of the drug exhibits.

G DECISION

[6] Thus, the crucial question in this case is whether the drug exhibits which had been produced at the trial were the same exhibits that were seized by PW4 from the appellant. The learned High Court found them to be the same exhibits. He held as follows:

> 27 Berdasarkan keterangan SP2, SP4, SP5 dan SP7 khususnya yang dibuat di atas, saya berpuashati bahawa walaupun ASP Izanizam tidak dipanggil memberi keterangan rantaian keterangan bagi barangan kes 'A1', 'A2', 'B1' dan 'B2' dan kandungannya tidak terputus.
>
> 28 Saya juga berpuashati bahawa bungkusan itu dan kandungannya merupakan barang kes yang ditemui pada peha dan betis tertuduh pada malam kejadian. Bungkusan dan kandungan itu jugalah yang telah kemudiannya dianalisis oleh SP2 yang mendapati bahawa serbuk putih

dalam bungkusan putih dalam bungkusan di bahagian 'A1', 'A2' 'B1' dan 'B2' itu mengandungi heroin sejumlah 2600.7g.

[7] The Court of Appeal holds the same view. It held as follows:

> On the evidence available we had no reason to disagree with the finding of the trial judge on this issue. We were satisfied that the same drug exhibits which were recovered from the appellant were sent to the chemist for analysis and later tendered in court. There was no basis to the defence's allegation that the drug exhibits had been tampered with or there was a break in the chain of evidence and handling of the drug exhibits.
>
> PW4 confirmed and identified all the four plastic packets which contained the prescribed drugs seized from the appellant. The same exhibits were handed over to the investigating officer, PW7, at about 3.30am on 28 September 2002, which was about four hours after the drug exhibits were recovered from the appellant. PW7 handed over the drug exhibits to the Forensic Department for fingerprint analysis, then to PW3 for DNA analysis and finally to PW2 for drugs analysis. PW7 later received the drug exhibits back from PW2 and sent them to PW1, the storekeeper for safe keeping. PW2, PW4 and PW7 identified the exhibits relating to the drugs in court.

[8] Both the High Court and the Court of Appeal have made a concurrent findings of facts that the drug exhibits produced in court were the same exhibits recovered from the appellant. It is trite law that it is not the practice of the apex court to review the concurrent findings of facts from the courts below (see *Public Prosecutor v Munusamy* [1980] 2 MLJ 133). It is also trite law that while the prosecution bears the burden of proving beyond a reasonable doubt that there were no gaps in the chain of evidence, it does not follow that in order to establish the identity of the exhibit, all persons who had handled the exhibit must be called as witnesses (see *Su Ah Ping v Public Prosecutor* [1980] 1 MLJ 75, *Satli bin Masot v Public Prosecutor* [1999] 2 SLR 637, and *Gunalan Ramachandran & Ors v Public Prosecutor* [2006] 2 MLJ 197).

[9] On the above authorities, it would appear that the non-calling of ASP Izanizam in this case would not be fatal to the prosecution's case. However, after going through the prosecution's evidence and in particular the evidence of the investigating officer ('PW7'), the appellant has strong basis to complain.

[10] In this case, it is not true that the identity of the drug exhibits was not disputed by the defence. PW7 was cross-examined on this issue. At p 84 of the record of appeal, PW7 was asked:

> Saya cadangkan barang-barang kes yang dirampas daripada OKT jika ada bukanlah barang-barang yang ada di Mahkamah hari ini.

[11] Thus, the identity of the drug exhibits was being challenged by the appellant. Once there is such a challenge, the prosecution bears the burden of proving beyond reasonable doubt that there are no gaps in the chain of evidence. It is the burden of the prosecution to adduce evidence that the drug exhibits that were recovered from the appellant and that were sent to the chemist for analysis were the same drug exhibits that the appellant was charged with.

[12] In this case, PW4 handed over all the exhibits recovered from the appellant to PW7 at about 3.30am on 28 September 2003. PW7 then put the exhibits into separate envelopes. For the drug exhibits, he put in envelope marked 'A1', 'A2' 'B1' and 'B2' He then kept all the exhibits in his steel cabinet at his office at IPD Sepang. On the next day, ie 29 September 2003, he took out the drug exhibits for the purpose of sending them to the Forensic Department for finger print analysis. He handed the drug exhibits to ASP Izanizam. His evidence is found at p 77 of the appeal record which reads as follows:

> Pada jam 1.10 tengah hari saya keluarkan barang kes dari peti kabinet di pejabat saya, iaitu barang kes bertanda 'A1, 'A2', 'B1' dan 'b2' dan berlepas bersama barang kes dan borang permohonan pengesanan cap jari ke Pejabat Forensik Maktab Cheras.
>
> Saya tiba jam kurang 2.35 petang di pejabat itu.
>
> Saya telah serahkan barang kes itu dan borang permohonan pengesanan cap jari kepada Penolong Juru Analisa cap jari ASP Izanizam bin Salleh.
>
> Saya boleh camkan ASP Izanizam [ASP Izanizam bin Salleh dari Makmal Forensik Cheras dicamkan].
>
> Kemudian saya terima resit.

[13] PW7 evidence on the same matter is further found at p 85 of the record of appeal, where during re-examination he said as follows:

> Pada 29/9/03 barang kes telah dihantar ke Bahagian Cap Jari Jabatan Forensik Maktab Cheras untuk analisis pengesanan cap jari.
>
> Saya terima semula barang kes itu pada 28/10/03.
>
> Barang kes dihantar ke Jabatan Kimia pada hari yang sama diterima daripada Jabatan Forensik. Barang kes tidak ada dalam simpanan saya sepanjang tempoh itu.

[14] It appears that PW7 after collecting back the drug exhibits from ASP Izanizam, packed the drug exhibits and sent them to the chemist. But nowhere in his evidence that he had indicated that the drug exhibits that he received from ASP Izanizam on 28 October 2003 were the same drug exhibits that he sent to ASP Izanizam on 29 September 2003. PW7 did not identify the drug exhibits to be the same exhibits.

[15] ASP Izanizam could have saved the situation, but he was not called as a witness for the prosecution. Through PW7, it was revealed that the findings of ASP Izanizam on the presence of finger print on the drug exhibits were negative. It was for that reason (as argued by the DPP) ASP Izanizam was not called as a witness for the prosecution, but only offered as a witness to the defence.

[16] But, we are of the view that the absence of positive identification by PW7 on the drug exhibits that he collected from ASP Izanizam were the same drug exhibits that he sent to ASP Izanizam earlier had put into doubt whether the drug exhibits that were analysed by the chemist were the same drug exhibits recovered from the appellant.

[17] In the circumstances of this case, ASP Izanizam should have been called by the prosecution as its witness. This is bearing in mind that the drug exhibits were in ASP Izanizam's custody for almost a month. If he was called as a witness, he could have explained what he did with the drug exhibits in particular as to how the drug exhibits were kept during the said period. Most importantly, he could have also identify the drug exhibits. But, it did not happen in this case. This has raised a doubt as to the identity of the drug exhibits. Therefore, we are giving the benefit of the doubt to the appellant.

[18] For the above reasons, we find that the conviction of the appellant is not safe. Accordingly, we allowed the appeal. The conviction and sentence are set aside.

Appeal allowed.

Reported by Kohila Nesan